

continues to be a favorable Plan investment because, among other things, it provides the Plan with an annual rate of return which is better than annual returns produced by other Plan investments at this time.

Therefore, the Trustee concludes that, effective January 1, 2004, the continued leasing of the Property by the Plan to the Employer for approximately a three (3) year period would be in the best interest of the Plan. The Trustee is attempting to sell the Property and has listed the Property for sale with the real estate firm of Coldwell Banker Kirkeby-Hall. The Property has been listed for sale since May 20, 2003. However, no offers have been received to date. The Trustee states that a shorter term lease is preferable because a long-term lease may dissuade a potential buyer from purchasing the Property, especially if the buyer desires to occupy the Property. Therefore, the Trustee and the Employer have agreed to a new leasing arrangement (*i.e.*, the New Lease), effective January 1, 2004, which will provide for the Plan's continued leasing of the Property to the Employer for at least three (3) years (as discussed below). Accordingly, the Employer and the Trustee are requesting an exemption for the New Lease under the terms and conditions described herein.

4. The New lease is a triple net lease for a term of three (3) years commencing January 1, 2004 and terminating December 31, 2006, both dates inclusive. The New Lease may be renewed by the Employer as the tenant for an additional period of one (1) year (the Option). The Option may be exercised upon giving sixty (60) days written notice to the Plan, as the landlord.

The interests of the Plan under the New Lease will be represented by the Trustee. In this regard, the Trustee states that it knows of no capital repairs or improvements that are required to the Property at this time, and does not anticipate any such repairs in the foreseeable future. The annual rental under the New Lease is payable in equal monthly installments. Initial rental under the New Lease will be \$7,200 per month, or \$86,400 annually.

5. The fair market rental value of the Property has been established periodically (pursuant to the terms of the Prior Lease and PTE 94-25) by Richard S. Kahler, CCIM, GAA, CFP (Mr. K), a professional real estate appraiser with Kahler Appraisal Services, located in Rapid City, South Dakota. Mr. K discusses the current fair market rental value of the Property in letters dated March 31, 2003 and August 6, 2003 (the Updates). In the Updates,

Mr. K refers to an appraisal prepared during the Prior Lease, as required under PTE 94-25. Mr. K states, among other things, that in 2002, the fair market rent for the Property was increased to \$9.00 per square foot. Furthermore, Mr. K also states that his market review prepared in March, 2003, did not evidence an additional increase in the fair market rental value for the Property at that time.

In anticipation of the New Lease or a possible sale of the Property to a third-party buyer, the applicant had Mr. K prepare an immediate restricted appraisal report (the Report) of the Property on October 15, 2003. In the Report, Mr. K relied on the sales comparison approach (SC Approach) and the income approach (Inc. Approach) in appraising the fair market value of the Property. Mr. K states that the current fair market value of the Property under the SC Approach is between \$748,000 and \$770,000. Under the Inc. Approach, Mr. K used an appropriate capitalization rate (*i.e.*, 9.0%),¹ to determine an estimated market value of between \$760,000 and \$785,000 for the Property. Therefore, as of October 15, 2003, Mr. K determined that the fair market value of a fee simple interest in the Property would be in the range of \$750,000 to \$800,000.

6. Furthermore, Mr. K has represented to the applicant and the Department that he will provide a full updated summary appraisal (Summary Appraisal) of the fair market value and fair rental value of the Property by middle of December, 2003. The New Lease has a provision stating that if the Summary Appraisal contains a fair market rental value for the Property that is higher than the current fair market rental value set forth in the New Lease (*i.e.*, \$7,200 per month, or \$86,400 annually), the Employer will amend the New Lease to pay the Plan the higher amount. Any new rental amount will be adjusted retroactive to January 1, 2004, to provide for the higher rental value as of that date. In addition, commencing January 1, 2004, any appropriate higher amount of rent will be paid to the Plan by the Employer within 30 days of the receipt of the Summary Appraisal.

Furthermore, the Trustee states that it will monitor the New Lease and its fair market rent provisions annually. The Trustee will obtain annual independent determinations of the fair market rental value of the Property. The Trustee will ensure that the Plan receives annual

increases in rents that reflect the fair market rental value of the Property.

Under the New Lease, the Employer will indemnify and hold the Plan harmless from all penalties, claims, demands, liabilities, expenses and losses of any nature arising from the Employer's use of the Property.

7. The Trustee will monitor the Employer's performance under the New Lease, on behalf of the Plan, and will enforce its terms and conditions. As the Plan's independent fiduciary, the Trustee will take whatever actions are necessary to protect the interests of the Plan and its participants and beneficiaries.

The Trustee has reviewed and evaluated the Plan's continued leasing of the Property to the Employer under the New Lease and has determined that the transaction would be in the best interests of the Plan's participants and beneficiaries. Specifically, the Trustee states that the Employer has proven to be a successful, reliable tenant of the Property, and that the Property constitutes a productive Plan asset.

8. In summary, the applicant represents that the subject transaction satisfies the criteria of section 408(a) of the Act because:

(A) The New Lease is a triple net lease requiring the Employer to pay all costs for repair, maintenance, taxes and insurance on the Property;

(B) The interests of the Plan under the New Lease are represented by the Trustee, an independent fiduciary which will monitor and enforce the Employer's performance under the terms and conditions of the New Lease;

(C) The New Lease ensures that the rental payments will remain no less than the fair market rental value of the Property for the duration of the transaction;

(D) The New Lease contains a provision stating that if the Summary Appraisal, due in mid-December 2003, contains a fair market rental value for the Property that is higher than the current fair market rental value set forth in the New Lease, the Employer will amend the New Lease to pay the Plan the higher amount, retroactive to January 1, 2004; and

(E) The Trustee has reviewed the Plan's continued leasing of the Property under the New Lease and has determined that the transaction would be in the best interests of the Plan and its participants and beneficiaries.

FOR FURTHER INFORMATION CONTACT:
Ekaterina A. Uzlyan of the Department at (202) 693-8540. (This is not a toll-free number.)

¹ A capitalization rate is a rate of interest used to convert a series of future payments into a single present value.